IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1023

FRANCHISE REALTY INTERSTATE CORPORATION and
McDONALD'S SYSTEMS OF CALIFORNIA, INC.,
Petitioners,

vs.

SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS, BARTENDERS AND HOTEL, MOTEL AND CLUB SERVICE WORKERS, an unincorporated association, GOLDEN GATE RESTAURANT ASSOCIATION, a corporation, and HOTEL EMPLOYERS ASSOCIATION OF SAN FRANCISCO, a corporation,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AS AMICI CURIAE
and
BRIEF FOR ERNEST W. HAHN, INC., ET AL., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AS AMICI CURIAE

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Respondents.

On Petition for a Writ of Certiorari

MOTION OF ERNEST W. HAHN, INC. AND CLIPPER EXXPRESS FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE

The above-named corporations hereby respectfully move the Court for leave to file a brief annexed hereto, as *amici curiae,* in support of the Petition for a Writ of Certiorari. Applicants requested the consent of the Petitioners and of the Respondents to file a brief as *amici curiae.* Petitioners, Franchise Realty Interstate Corporation, et al., granted their consent. Respondents refused their consent.

The case now before this Court will almost certainly control the outcome of two private, treble damage actions in which Applicants are plaintiffs.* Applicants' cases involve many of the same basic legal

Ernest W. Hahn, Inc. v. Hugh B. Codding and Codding Enterprises (N.D. Cal. No. C 75 2706 [WWS] and *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.* (N.D. Cal. No. C 72 863 [AJZ]).

issues as those presented by the case now before the Court. There are, however, significant factual differences among these cases, and Applicants rest their motion for leave to file a brief as *amici curiae* as much upon those differences as upon the similarities. Applicants desire to present arguments and viewpoints which the parties themselves will probably not present.

The instant case raises issues of grave importance to the effectiveness of antitrust policy and enforcement. The rulings of the majority in the court below emasculate the controlling authorities and render necessary further definition, by this Court, of the manner and extent to which conspirators and would-be monopolists may use the judicial and adjudicatory processes of government to destroy competitors or create artificial barriers to market entry. The present case displays one variety of such abuse, but there are many others. Applicants believe that it will be of assistance to this Court, in framing a rule of general application, to have before it a discussion of other types of cases involving the abuse of the adjudicatory processes for anticompetitive purposes. Indeed, one of the central precedents in this area, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), itself stresses the importance to governmental decision makers of a flow of information and views provided by persons with an interest in the outcome of the proceedings. Applicants hope to serve that function here.

Applicant Ernest W. Hahn, Inc. (hereafter "Hahn") is engaged in commercial real estate development, including regional shopping centers. Hahn

is plaintiff in *Ernest W. Hahn, Inc. v. Hugh B. Codding, et al.*, a Sherman Act treble damage action now pending in the United States District Court for the Northern District of California. The original complaint in that case alleged that Hahn had successfully negotiated an agreement with the Urban Renewal Agency of the City of Santa Rosa, California, to serve as the private developer of a regional commercial shopping center as an integral part of the Agency's downtown urban renewal project. It was further alleged that the Agency proposed to issue certain municipal bonds to finance the acquisition and preparation of the renewal project area prior to redevelopment. The defendants, Hugh B. Codding and Codding Enterprises, are alleged to possess a dominant position in the relevant market of "the development, construction and operation of commercial shopping centers within Sonoma County, State of California".

The defendants, aware that the pendency of litigation challenging agency action would preclude issuance of the municipal bonds necessary to finance the project, were alleged to have "agreed and conspired to file a series of overlapping, repetitive, and baseless lawsuits . . . without probable cause and regardless of the merits of the claims asserted therein". The record reflects that the defendants filed nine (9) separate lawsuits directly, and covertly financed and controlled four (4) additional suits against the project. All thirteen were unsuccessful on the merits, most being summarily resolved against the defendants and their allies. Despite this dismal record, the proposed shopping center development has been stalled since the summer of 1973; and the pendency of appeals still

precludes the issuance of the municipal bonds necessary to finance acquisition of the project area.

Also despite this dismal record the District Court, *sua sponte,* ordered Hahn to show cause why its complaint should not be dismissed on the authority of the opinion of the Court of Appeals in the instant case. Following briefing and argument, the District Court entered an order of dismissal with leave to amend.

Applicant Clipper Exxpress (hereafter "Clipper") is engaged in the business of freight forwarding pursuant to a permit issued by the Interstate Commerce Commission (hereafter "ICC"). Clipper is plaintiff in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.,* a Sherman Act treble damage action also pending in the United States District Court for the Northern District of California. The complaint in that case alleges that Clipper and other regulated members of the Freight Forwarders Bureau (hereafter "FFB", a Section 5(a) Interstate Commerce Act rate bureau) experienced substantial loss of business to unregulated shipper associations in the late 1960's. In response, the FFB filed a tariff proposal with the ICC to substantially reduce the rates charged by freight forwarders and thereby permit them to compete more effectively with the unregulated associations.

The defendants, Rocky Mountain Motor Tariff Bureau (hereafter "RMMTB"), and its members carriers are alleged, *inter alia,* to have filed and prosecuted repetitive, sham protests before the ICC for the purpose and with the effect of frustrating and delaying the initiation of reduced, competitive rates.

The alleged result of this program of baseless, sham opposition before the ICC was a substantial loss of traffic and revenue arising from the delay in ultimate approval and implementation of the reduced tariffs.

The proliferation of legal and regulatory standards, the inherent costs and delays of the adjudicatory process, and the severe disruption and damage which may be inflicted upon one's competitors regardless of the ultimate outcome of a lawsuit have all contributed to the use of the courts as anticompetitive weapons. The prevalence of such abuse is reflected by the number of cases raising these issues in this Court and throughout the Federal Judiciary. The reasoning of the majority opinion in the court below denies that the United States Courts possess the power to protect themselves against such subversion and to redress private injury flowing from such abuse.

Wherefore, the Applicants respectfully pray that they be granted permission to file a brief *amici curiae* in support of the Petition before the Court, in order to present arguments and viewpoints on the matters involved which the parties will probably not present.

Dated, March 8, 1977.

Respectfully submitted,

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BRIEF OF ERNEST W. HAHN, INC. AND CLIPPER EXXPRESS AS AMICI CURIAE

QUESTION PRESENTED

Under what circumstances are conspirators or would-be monopolists liable under the Sherman Act for the use of the governmental adjudicatory processes to destroy competition?

INTEREST OF THE AMICI

Ernest W. Hahn, Inc. (hereafter "Hahn") is a corporation engaged in commercial real estate development including the development of retail shopping centers. In 1973, Hahn negotiated an agreement with the Urban Renewal Agency of the City of Santa Rosa, California (hereafter the "Agency"), to serve as the private developer of a regional shopping center as an integral part of a downtown renewal project in Santa Rosa. The Agency proposed to issue approximately fifteen million dollars of tax increment bonds to finance site acquisition and preparation of the project area. The issuance of a "no-litigation" certificate by the Agency's bond counsel was a prerequisite to the sale of the proposed bonds.

Hahn is the plaintiff in an action under the Sherman Act against a combination of Santa Rosa businesses which operate the only major shopping centers in the Santa Rosa area and also control several parcels of land earmarked for development as a regional shopping center. This group, aware of the preclusive effect litigation would have upon the financing of the urban renewal project, are alleged to have agreed to file a series of repetitive and baseless lawsuits for the purpose and with the effect of excluding Hahn from the market and thereby preserving their monopoly. Since April, 1973, the defendants filed nine (9) lawsuits and covertly financed and controlled four (4) other actions challenging the downtown project. All of these actions were decided against the defendants, most summarily. Nevertheless, the cumulative effect has been to delay the acquisition of the project area

and development of the competitive shopping center to the present date and the pendency of appeals continues to frustrate the issuance of the necessary municipal bonds.

The original complaint filed by Hahn was dismissed by the District Court for the Northern District of California on the authority of the Court of Appeals' decision in this case. A motion to dismiss the First Amended Complaint is currently pending.

Clipper Exxpress (hereafter "Clipper") is a corporation engaged in the business of freight forwarding under a permit issued by the Interstate Commerce Commission (hereafter "ICC"). It is plaintiff in an action under the Sherman Act which alleges that a motor carrier rate bureau filed repetitive, sham protests of tariff proposals filed by freight forwarders designed to reduce rates and permit forwarders to compete more effectively with unregulated shipper associations. The effect of that sham use of the regulatory protest mechanism was to delay for approximately two years the implementation of the reduced rates, causing substantial loss of traffic and revenue to Clipper.

A renewed motion to dismiss the *Clipper* action upon the authority of the instant case was denied by the District Court.

Amici are vitally concerned with their freedom to operate their business and to compete freely. They have no objection to valid governmental regulations governing the conduct of their business. But they believe it is essential that governmental processes of

adjudication not be subverted or abused by sham actions whose sole purpose is to destroy their ability to enter markets and compete fairly.

ARGUMENT

I. THE SUBSTANTIVE VALIDITY OF A CLAIM BASED UPON ABUSE OF THE ADJUDICATORY PROCESS IS ESSENTIAL TO EFFECTIVE ANTITRUST POLICY AND ENFORCEMENT

The antitrust laws in general, and the Sherman Act in particular, have been described by this Court as "the Magna Carta of free enterprise . . . as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedom". *United States v. Topco Associates,* 405 U.S. 596, at 610 (1972). The Act is to be construed in a manner comparable to that applied to constitutional provisions, *Appalachian Coals v. United States,* 288 U.S. 334, 359-60 (1933), in order to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.,* 324 U.S. 293 (1945).

In the early years of antitrust policy there were few opportunities for monopolization through misuse of governmental processes because governmental regulation of business was not as pervasive as it is today. The last several decades have witnessed an astounding proliferation of regulatory and remedial legislation governing market entry, conduct and performance by American business. These regulatory policies and

constraints, concerning such diverse aspects of business as competition, wages, hours, prices, discrimination, zoning, pollution and other environmental impacts of operation, are implemented by the courts and by myriad agencies, boards, and commissions. To enter a market and vie for the consumers' favor, businesses of all types must obtain and retain the approval of these regulatory authorities.

This profusion of governmental authorities protects the public in many ways, but it also creates virtually unlimited opportunities for abuse. The inherent costs, delay, and disruption of business planning often produced by litigation gives rise to the possibility that the mere persistent use of litigation will be employed by established and powerful businesses in strong market positions, either alone or in combination, to exclude competition or render market entry extremely difficult and costly.

This possibility was recognized by the Court when it enunciated the "sham" exception in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 at 144 (1961):

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

In two subsequent cases this Court had occasion to interpret and apply this exception in the context of

the adjudicatory functions of government. Thus, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Court held that an alleged conspiracy of truckers to indiscriminately protest applications for operating rights before regulatory agencies "with or without probable cause and regardless of the merits of the cases", *id.* at 513, stated a valid claim for relief under the Sherman Act, because it effectively denied competitors access to the agencies and courts. The Court noted that there were "many other forms of illegal and reprehensible practices which may corrupt the administrative or judicial processes and which may result in antitrust violations", *id.* at 513, even though these practices in the context of the legislative or executive functions of government would be immune from antitrust sanctions.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366, at 380 (1973), the Court interpreted its *California Motor Transport* decision as holding "that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*". On appeal following remand the Court affirmed the District Court judgment that the power company's program of litigation violated the Sherman Act. *See* 417 U.S. 901 (1974). That program of litigation was designed and implemented to frustrate potential competitors' efforts to finance competitive facilities rather than to deny them ac-

cess to the courts or agencies. The insubstantial claims asserted by the defendant reflected an intent to abuse the judicial process and to create a direct restraint upon competition.

These decisions recognize that the judicial process and procedures are designed to justly resolve individual disputes on their merits as quickly and inexpensively as possible. Where parties initiate litigation, not for the purpose of obtaining a favorable decision on the merits, but rather to use the process and procedures to directly injure their competitors more than competition is injured. The judicial process itself is subverted and the discharge of the forum's mandate to do justice is frustrated. Where conspirators or would-be monopolists can so use the judicial process with impunity, respect for the integrity and impartiality of the courts is impossible to maintain. At the same time, the political values protected by the right to petition—access to government and free exchange of information—are absent, for the wrongdoers rely upon the *process,* rather than governmental *decision,* to exclude or injure competition. *Noerr, California Motor Transport Co.* and *Otter Tail* all recognize that under these circumstances such abuse of the judicial process for anticompetitive purposes should be subject to antitrust liability.

The disregard of these authorities by the majority opinion of the court below in the instant case, *Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board, etc.,* 542 F.2d 1076, 1080-81 (9th Cir. 1976) is untenable; it was accom-

plished only by elevating trivial factual distinctions into determinative significance. Thus, the majority would limit the "sham" exception to publicity campaigns (*Id.*, 542 F.2d at 1080); the holding of this Court in *California Motor Transport Co.* to the widespread publication of threats of litigation having the effect of actual denial of access to the courts or administrative agencies (*Id.*, 542 F.2d at 1081), and this Court's holding in *Otter Tail* by first, denying any holding on this issue by the Court and second, *arguendo*, that the government's case depended upon "the fact that the defendant had used the threat of litigation as a bludgeon in its attempts to retain its monopoly . . ." (*Id.*, 542 F.2d at 1084).

The general rule derived by the majority opinion in the court below, *viz:*

> ". . . that defendants who engage in *Noerr*-protected lobbying activities may nevertheless subject themselves to antitrust liability if they engage in activities external to or abusive of the legislature or judicial process, which activities, like the threats of opposition in Trucking Unlimited, tend to harass and deter . . . competitors from having 'free and unlimited access' to (appropriate) agencies." (*Id.*, 542 F.2d at 1082 n.4)

is itself directly contrary to the holding of this Court in *United Mine Workers v. Pennington,* 385 U.S. 657 at 670 (1965) that genuine efforts to influence governmental action do not violate the antitrust laws "either standing alone or as part of a broader scheme itself violative of the Sherman Act".

Conduct either is or is not immune; and resolution of this question must turn on whether the effort to influence governmental action is *genuine* or merely *ostensible.* The critical issue is thus the intent or purpose for invoking governmental processes. Assuming in all cases arising under the *Noerr-Pennington* doctrine an underlying purpose to restrain or injure competition, did the actor intend to genuinely induce governmental acting having that result or did he intend to directly produce the result by the mere use of the governmental process and procedures? If the evidence shows the former, immunity should follow. If the evidence shows the latter, liability should be imposed both to protect competition and to punish the subversion of the governmental process.

II. THE HOLDING OF THE MAJORITY IN THE COURT BELOW LOGICALLY BARS ALL GOVERNMENTAL REGULATION OF THE ABUSE OF GOVERNMENTAL PROCESSES

This case does not involve Sherman Act liability alone. The reasoning of the majority, resting on constitutional grounds, logically forecloses all regulation of the manner in which or the purposes for which governmental processes are used. Given the general recognition of the fundamental importance of antitrust policy and enforcement, see *United States v. Topco Associates, supra; Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969), it is difficult to comprehend how antitrust liability can be denied, without destroy-

ing the court's power to apply common law tort sanctions (*e.g.,* malicious prosecution, abuse of process), punish for contempt of court, enforce doctrines concerning the finality of judgments or rules of procedure. If persons have a First Amendment right to use the adjudicatory process in any manner and for any purpose they choose, then rules of standing, procedure or finality which limit that right must be unconstitutional. Such a result is absurd yet logically mandated the decision of the court below.

III. THE SPECIAL PLEADING RULE ANNOUNCED BY THE MAJORITY IS CONTRARY TO THE FEDERAL RULES AND IMPOSSIBLE TO COMPLY WITH

In addition to its disregard of the governing substantive principles, the majority in the court below promulgated a rule requiring particularity in pleading liability based upon "conduct which is prima facie protected by the First Amendment . . ." 542 F.2d at 1082-83:

> "What we . . . hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."

As Chief Judge Browning noted in dissent, this rule would apply to most antitrust actions, 542 F.2d at 1089. It would also apply in all defamation cases and

most litigation under the federal and state securities laws. *A fortiori* it would apply in suits sounding in perjury, contempt, extortion, tax evasion and many other areas of the law. Each of these is an area where "expressive activity" may result in liability. The possibility of being subjected to suit will create a "chilling" effect upon the potential defendant's exercise of his First Amendment rights of speech, press or petition. Liability in each of these areas, as under the "sham" exception to the *Noerr-Pennington* doctrine, turns upon the state of mind of the actor—"actual malice" in defamation or invasion of privacy cases [*New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Time, Inc. v. Hill,* 385 U.S. 374 (1967)]; "scienter" in litigation under Rule 10(b)(5) of the Securities Exchange Act of 1934 [*Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976)] "willful" and "deliberate" falsification of the areas of tax evasion and perjury. In each of these areas state of mind is a critical fact, yet Rule 9(b), Federal Rules of Civil Procedure, expressly provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Indeed, it is precisely because of the critical importance of purpose or intent in antitrust litigation that such rigorous standards are applied to motions for dismissal or for summary judgment in these cases. As this Court held in *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, at 473 (1962):

> ". . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely

in the hands of the alleged co-conspirators and hostile witnesses thicken the plot."

Accord: Hospital Building Company v. Trustees of the Rex Hospital, ... U.S. ....., 48 L.Ed.2d 388 (1976).

The majority of the court below, recognizing the difficulty of proof in this area, apparently believes that the plaintiff should be denied an opportunity to develop such proof and the court spared the difficult task of ascertaining state of mind. This approach was only recently rejected by the Court of Appeals for the Third Circuit in *Ungar v. Dunkin Donuts of America, Inc.,* 531 F.2d 1211, at 1226 (3d Cir.), *cert. denied,* ..... U.S. ....., 97 S.Ct. 74 (1976):

". . . we are aware of no principle that courts will not inquire into state of mind where that is relevant; the fact that a given legal line is hard to draw does not excuse judges, and juries, as each case arises, from doing their best to draw it. Consider, for example, the problem of determining degrees of culpability: was the conduct 'intentional', 'knowing', 'reckless', 'willful'? These kinds of questions are metaphysical, perhaps, but it is the unfortunate province of the courts to struggle with them."

The approach of the majority of the court below should also be rejected in the instant case.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that both the substantive and procedural rules announced by the majority of court below in the instant case are contrary to governing authority and extremely destructive to antitrust policy and enforcement. *Amici* respectfully urge the Court to grant the Petition for a Writ of Certiorari in this case and correct those erroneous rulings. The requirements of effective democratic government as well as the effectiveness of antitruse enforcement require no less.

Dated, March 8, 1977.

Respectfully submitted,

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